



Case Western Reserve Journal of International Law

Volume 44 | Issue 1

2011

The Crisis of International Law

Joel P. Tractman

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Joel P. Tractman, *The Crisis of International Law*, 44 Case W. Res. J. Int'l L. 407 (2011)

Available at: <https://scholarlycommons.law.case.edu/jil/vol44/iss1/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE CRISIS OF INTERNATIONAL LAW

Joel P. Trachtman*

*Observers of international law have criticized the Westphalian paradigm for nearly a century. The Westphalian paradigm has become less useful, both as a general way to order the world, and as a general way to understand the world. Functional adaptation has already begun to re-order the world inconsistently with the Westphalian paradigm. The European Union is only the most obvious example. But this reordering has been impeded by the continued use of the Westphalian paradigm to understand the world. Indeed, the exceptions to the Westphalian paradigm have been multiplying for the past 100 years, and the movement toward an international law of cooperation that Wolfgang Friedmann documented in 1964 in *The Changing Structure of International Law* has accelerated and intensified the exceptions to the Westphalian paradigm so much that it no longer satisfies the test of Occam's Razor. This is the central crisis in international law. A simpler paradigm, one admitting far fewer exceptions, is the functionalist paradigm, which accepts that the state is contingent, and that international law tends to constrain, indeed, to mold, the state based on functional efficiency. This essay elaborates a functionalist paradigm that understands the sovereignty of states in utilitarian, and contingent, terms.*

I. WHAT CRISIS?	407
II. THE WESTPHALIAN PARADIGM AND THE MULTIPLICATION OF EXCEPTIONS	409
III. THE SOCIAL SCIENCE FUNCTIONALIST PARADIGM	413
IV. CONCLUSION: WORLDVIEW IMPLICATIONS OF SOCIAL SCIENCE FUNCTIONALISM	420

I. WHAT CRISIS?

Perhaps we use the term “crisis” too readily, in a kind of collective anxiety that disaster is just around the corner. It is true that disaster—in the form of war, disease, environmental degradation, financial catastrophe, and trade war—is always just around the corner. But that is a constant condition. So what is the crisis today?

* Professor of International Law, The Fletcher School of Law and Diplomacy

An appropriate definition of “crisis” is that it is “a stage in a sequence of events at which the trend of all future events, especially for better or for worse, is determined.”¹ In this sense, a crisis is a juncture between paths—one for better, one for worse. But the choice of paths at this moment is not just at the level of policy choice on issues such as war, disease, and the environment. Rather, it is a choice of paths about the role of international law in our lives. We can choose to continue to use a Westphalian paradigm that assumes that the state is the exclusive source of authority, that assumes and institutionalizes a weak form of international law, and that fails to provide tools to address our most pressing international problems, or we can choose a more scientific and open-minded functionalist paradigm.

We are in the midst of a Kuhnian scientific revolution in international law, in which the existing paradigm has grown increasingly unable to explain what we do, or to give us the tools to devise solutions to our problems.² A scientific revolution occurs, according to Kuhn, when scientists encounter too many anomalies that cannot be explained by the accepted paradigm.³ The number of anomalies to the Westphalian paradigm has multiplied in the past century, and the existing paradigm has too many exceptions. There is a new paradigm which can accommodate all the existing exceptions and that can provide a framework for analysis that allows us to see where additional international law and organization would be useful, and also where it would not. This new paradigm, described below, might be labeled “social science functionalism.” In this sense, our crisis is an intellectual or theoretical crisis, but it has important real world effects. The paradigm, according to Kuhn, is not just a theory, but the entire worldview that it entails.

In this brief exposition,⁴ I describe the existing paradigm, explain what I see as the growing pressure on this paradigm and the multiplication of exceptions, propose a social science functionalist paradigm, and explain the worldview implications of functionalism.

¹ *Crisis Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/crisis> (last visited Mar. 3, 2012); *see also* NEW OXFORD AMERICAN DICTIONARY 410 (3d ed. 2010).

² *See* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 77 (3d ed. 1996). When a present paradigm is no longer able to give us the answers we seek, “[t]he decision to reject one paradigm is always simultaneously the decision to accept another.” *Id.*

³ *Id.* at 6.

⁴ I expand on this exposition in my forthcoming book, JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* (forthcoming 2012).

II. THE WESTPHALIAN PARADIGM AND THE MULTIPLICATION OF EXCEPTIONS

The Westphalian paradigm is still the dominant paradigm in international law. It posits that international law is weak, and that the state is strong. Under the Westphalian paradigm, state sovereignty is the dominant concept, and it excludes the possibility of international legal authority.⁵ Rather, under the Westphalian paradigm, international law is a weak force that can play only an interstitial role.⁶

One of the corollaries of the Westphalian paradigm is the consent-based system of international lawmaking.⁷ Unlike in national government systems, there is no possibility to bind holdouts. The inability to bind holdouts makes it more difficult to reach agreement to provide international public goods, and to address international externalities, especially under circumstances of asymmetry. By asymmetry, I mean circumstances in which the overall value of an international legal rule is significantly greater for one state proposed to be party than for another. For example, while many states will be hurt by global warming, there are some states that would not be harmed, or would benefit. Without the possibility to bind holdouts, presumably accepted by each state in a kind of “constitutional moment” in exchange for other states agreeing to do likewise, it is difficult to create effective international legal rules and organizations. Examples of areas in which these rules and organizations may be required include international environmental protection, international public health, trade and international financial regulation.

A second corollary of the Westphalian paradigm, related to the first, is weak enforcement of international law.⁸ In fact, we might characterize this corollary as a requirement of subsequent consent to actually have a state’s conduct controlled by a legal rule that attained initial consent—that entered into force—at an earlier time. The broader rule that includes both corollaries is one of continuous state autonomy—both at the time of entry into international law and at the time of its application or enforcement.⁹ The

⁵ See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 20 (1999) (“[Sovereignty] is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.”).

⁶ *Id.*

⁷ E.g., Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 443–44 (2010).

⁸ See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 28–39 (2009) (arguing that the lack of institutional structure in international law causes the weakness in international law).

⁹ See KRASNER, *supra* note 5, at 20 (explaining that within states “domestic political authorities are the sole arbiters of legitimate behavior”).

result of this second corollary is to make international law an unreliable system, unable to address real international cooperation problems because states are unable to commit to obligations. In fact, a growing stream of international legal scholarship, recently evidenced by work of Curt Bradley and Mitu Gulati,¹⁰ seeks to accentuate the Westphalian paradigm by arguing for the need for continuing consent to the binding effect of international law. Other scholars, such as Eric Posner, simply argue that international law is incapable of having the power to cause compliance.¹¹ Note that this corollary actually denies states an important power: the power to bind themselves contractually to cooperate with other states. By doing so, it artificially impedes desirable cooperation.

So, the Westphalian paradigm, under both of its corollaries, impedes or prevents cooperation by states to address international cooperation problems. This was not as serious a problem when fewer international cooperation problems existed, but as we move from the “law of coexistence” to the “law of cooperation,” this problem has grown more serious. Just a century ago, none of the major new categories of international law—addressing trade, investment, finance, monetary policy, environment, health, human rights, and cybersecurity—were very significant. There were good reasons—functional reasons—why they were not. There simply were few international concerns raised by these types of issues.

As Wolfgang Friedmann explained in his classic 1964 work, *The Changing Structure of International Law*, “the principal preoccupation of the classical international law, as formulated by Grotius and the other founders, was the formalization, and the establishment of generally acceptable rules of conduct in international diplomacy.”¹² This was the international law of coexistence, and it also included the regulation of war, which developed into the main concern.¹³ These were rules about the method by which states would interact, and about their use of force, and while states

¹⁰ See Curtis A. Bradley & G. Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 275 (2010) (arguing against a restriction on opt-out rights under customary international law which would eliminate the need for consent).

¹¹ Compare POSNER, *supra* note 8, at x, with Joel P. Trachtman, *Book Review: The Perils of Global Legalism*, 20 EUR. J. INT'L L. 1263 (2009).

¹² WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 5 (1964); accord 22 DOUGLAS M. JOHNSTON, *CONSENT AND COMMITMENT IN THE WORLD COMMUNITY: THE CLASSIFICATION AND ANALYSIS OF INTERNATIONAL INSTRUMENTS* (1997). Johnston suggests that the period until World War I was a period of “classical” international law, focusing on constraining the use of force, communication, and settlement of disputes. The subsequent “neo-classical” period until the mid-1960’s extended this project to intergovernmental organization, codification, and human rights. For Johnston, the current “post-classical” period is concerned with the establishment of cooperative regimes and the transformation of international society to a world community.

¹³ FRIEDMANN, *supra* note 12, at 5.

interacted in various ways, they did not contract significantly over other matters. But as Friedmann explained, the changing demands of international society produced demand for additional types of international law.¹⁴

Two major types of change have made the role of the international law of cooperation more important. First, with industrialization, including technological change, urbanization, and the development of modern economies, the state has found it useful to intervene domestically in a variety of regulatory contexts.¹⁵ This is the rise of the regulatory or interventionist state. Second, with globalization, these interventions and the circumstances to which they respond often cross borders or affect the conditions of cross-border competition.¹⁶ Furthermore, globalization has included greater industrialization of developing countries, increasingly involving poor countries in these concerns.

Above, I mention the growing argument that the enforcement of international law should be conditioned on contemporaneous consent. This should be understood as an attack on the distinguishing characteristic of international law: its ability to bind states to take action that they otherwise would not consent to take. The attack by international legal scholarship on international law has had a second dimension, proposing that so-called “soft law” can achieve most of the goals of international law in a superior manner.¹⁷ The move toward soft law is best understood as an attempt to address current international problems, while acquiescing in the Westphalian paradigm.

Of course, as Andrew Guzman and Timothy Meyer have explained, there is no reason to believe that soft law could not be a satisfactory, indeed an optimal, method of cooperation in particular cases.¹⁸ This is clear in theory, and the fact that states make soft law suggests that it serves some cooperation purposes. Some scholars have recently argued that in particular contexts, such as international finance¹⁹ or carbon reduction,²⁰ soft law is superior to hard law.

¹⁴ *Id.* at 152.

¹⁵ Steven Wheatley, *A Democratic Rule of International Law*, 22 EUR. J. INT'L L. 525, 528–29 (2011).

¹⁶ *See id.*

¹⁷ Andrew Guzman & Timothy Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 222 (2010).

¹⁸ *See id.* at 176–78 (explaining the benefits of soft law).

¹⁹ *See* Chris Brummer, *Why Soft Law Dominates International Finance—and Not Trade*, 13 J. INT'L ECON. L. 623, 628–29 (2010).

²⁰ *See* Alexander Thompson, *Efficiency, Distribution and the Soft Law Future of the Climate Regime* (Apr. 8–9, 2011) (unpublished manuscript) (prepared for presentation at the International Policymaking and Agreements Conference, Yale University), *available at* http://www.yale.edu/leitner/resources/IEPA-papers/Thompson_Climate_Yale.pdf (discussing soft law as an appropriate regime given the nature of the problem of climate change).

However, it is also true that soft law would not be a satisfactory method of cooperation in all cases. This is also clear in theory: the fact that states make hard international law suggests that it is superior to soft law in some cases. The binding nature of hard law, the default rules that it entails, the possible linkage to other hard law rules, and other features of hard law, would be expected to be valuable in particular cases.²¹ As Guzman and Meyer point out, where the only goal is coordination, soft law may serve well.²² However, where a state may gain by its violation, as in cases of externalities or public goods, cooperation—as opposed to coordination—is needed.²³

The Westphalian paradigm thus renders international law unsuitable to address important international problems. The fact that states seek to address these problems can be seen as the major exception, and the major source of pressure, on the Westphalian paradigm.²⁴ The move from the international law of coexistence to the international law of cooperation has resulted in greater need for cooperation.²⁵ At the same time, it has resulted in greater asymmetry and greater asset specificity.²⁶ Asset specificity occurs where cooperation might require states to make substantial investments in cooperation prior to their opportunity to ascertain whether other states will hold up their end of the bargain.

Asymmetry causes holdouts where there are differences in national goals, levels of wealth, or pre-existing national structures, making it less desirable for some states to cooperate than others.²⁷ The problem of holdouts can be addressed either by structuring compensating payments or package deals, or by establishing rules of non-unanimous decision-making.²⁸

At the time of enforcement, asymmetry and asset specificity result in strong incentives for states not to comply, given that they have different

²¹ See Guzman & Meyer, *supra* note 17, at 175–76 (2010) (giving examples why a state may prefer hard law to soft law).

²² See *id.* at 190 (“[T]hese coordination problems can be solved in a variety of ways, and soft law instruments are among them.”).

²³ See *id.* at 198–99.

²⁴ See Georges Abi-Saab, *General Conclusions*, in 1 STANDARD-SETTING IN UNESCO: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE 395, 396–97 (Abdulqawi A. Yusuf ed., 2007) (describing the Westphalian system and how it is unsuitable to resolve problems of international law).

²⁵ See *id.* at 397 (discussing the transition from the international law of coexistence to the international law of cooperation).

²⁶ See *id.* at 397–98 (explaining cooperation based on an individual nation’s capacity).

²⁷ See *id.* (describing a “division of labor” between participating nations when cooperating towards a common goal).

²⁸ See Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 964 (2000) (“Some international laws reflect the distribution of power in which powerful nations gain and weak nations lose.”).

interests or that the other state or states have already made their contribution and the states that have not can obtain these benefits without contributing themselves.

III. THE SOCIAL SCIENCE FUNCTIONALIST PARADIGM

I argue below that an appropriate evolution of the functionalist and neo-functionalist approaches to international integration—to the development of international government—would approach integration from the standpoint of the new institutional economics. “New institutional economics”²⁹ addresses the reasons for formation of institutions, and for particular institutional structures. The methods of new institutional economics include price theory, transaction costs economics, and game theory. While functionalism, and its neo-functionalist enhancement, has evolved to be compatible in most dimensions with the new institutional economics, this compatibility has not been generally accepted.³⁰ By making the compatibility explicit, I am able to link functionalism to modern social scientific ideas about why people, and states, form institutions, including international law and international organizations.

As an intellectual doctrine, social science functionalism began with David Mitrany’s 1933 work, *The Progress of International Government*.³¹ Mitrany posited that if international administrative capacity were developed in order to address specific technical problems, there would be a “spillover” effect pursuant to which increasing functions would be assigned to international administration, and eventually individuals would transfer their loyalty to these organizations.³² While in the broadest sweep of history, it is possible that this type of process might occur, there are two core problems with Mitrany’s doctrine. First, he did not specify a plausible causal mechanism for spillover. We might suggest that synergies in the form of economies of scale or economies of scope would be one plausible causal mechanism.

²⁹ See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990); OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio ed., 1992); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT’L L. & BUS. 470 (1997).

³⁰ But see Wayne Sandholtz & Alec Stone Sweet, *Law, Politics, and International Governance*, in THE POLITICS OF INTERNATIONAL LAW 238 (Christian Reus-Smit ed., 2004) (referring to the new institutional economics literature).

³¹ See DAVID MITRANY, THE PROGRESS OF INTERNATIONAL GOVERNMENT (1933) (discussing international government, state equity, communal organization of world affairs, and states’ authority).

³² See *id.* at 61–62 (discussing small states placing their faith in an international organization).

Once we specify this type of causal mechanism, we see the second problem: economies of scale and scope would only apply in specific contexts—not in all contexts. Therefore, there will remain an important role for the state. Furthermore, there is no need for a transfer of loyalty. Loyalty is a complex emotional and rational sense, and a rational transfer of authority might precede by many generations a transfer of loyalty.³³ Friedmann was influenced by Mitrany.³⁴ As Charles Leben writes, for Friedmann:

[S]tates were, whether they liked it or not, drawn into a cooperation movement because in both economic and technical terms they had become objectively interdependent. Governments needed to ensure this cooperation not only by concluding bilateral or multilateral treaties in ever-growing numbers, but especially by creating international organizations to carry out the functions essential to the welfare of states. Friedmann was undoubtedly influenced here by the so-called functionalist doctrine³⁵

One may understand this essay as an extension of the functionalist project. However, it should not be understood as advocacy for integration, or, like functionalism, as assuming a *telos* of integration, but rather as an attempt to develop a methodology for the analysis of integration that includes the possibility of both integration and disintegration. While there is no *telos* of integration, it is possible to examine changing social, technological, military, environmental, and economic trends and to anticipate resulting institutional needs. There will also be circumstances in which changing circumstances make disintegration appropriate.

Functionalism and neofunctionalism were speculative and idealistic.³⁶ They suggested that the formation of secretariats would have unintended spillover effects, providing a “supply” of integrative machinery that would stimulate demand.³⁷ These spillover effects were never fully theorized, nor empirically validated, and the teleology of integration posited by the neo-functionalists could not survive observations of reversals of integration.³⁸

³³ See JOHN S. GIBSON, *INTERNATIONAL ORGANIZATIONS, CONSTITUTIONAL LAW, AND HUMAN RIGHTS* 115 (1991) (discussing organizations that have goals of shared security and well-being instead of their nation's goals and policies).

³⁴ Charles Leben, *The Changing Structure of International Law Revisited by Way of Introduction*, 8 EUR. J. INT'L L. 399, 401 (1997) (explaining that David Mitrany influenced Friedmann in Friedmann's 1943 work *The Changing Structure*).

³⁵ *Id.*

³⁶ See GIBSON, *supra* note 33, at 107 (stating that functionalism “encompasses much idealism, or what ought to take place in international integration”).

³⁷ See *id.* at 75 (discussing spillover effects and a shift from stabilization to economic equalization).

³⁸ See *id.*

Mitrany himself rejected social scientific approaches, relying instead on “judgment.”³⁹ This may be understood as dissatisfaction with the then-current state of social science. Regardless, modern analytical sensibilities would find “judgment” inadequate where social scientific theory and methods possess greater analytical leverage. One of the social scientific heirs to functionalism is the field of study known as “constitutional economics,” which examines the social scientific causes and effects of constitutional rules.⁴⁰

The functionalism and neofunctionalism of David Mitrany and Ernst Haas⁴¹ was famously discredited because it appeared to claim too much, with inadequate social scientific foundations, and an inability to overcome empirical challenges.⁴² And yet, the functionalist idea can be accommodated comfortably within established social science, including especially, but by no means limited to, the new institutional economics. A social scientific perspective on functionalism asks simply what are the costs and benefits of legal rules and institutions.⁴³ This normative social science functionalist theory is agnostic regarding the types of rules or institutions that will be selected, but theorizes that rules and institutions serve the function of allowing cooperation that provides benefits greater than its costs.⁴⁴ A positive social science functionalist theory would seek to link certain causes

³⁹ See, e.g., David Mitrany, *A Political Theory for the New Society*, in FUNCTIONALISM: THEORY AND PRACTICE IN INTERNATIONAL RELATIONS 25, 26 (A.J.R. Groom & Paul Taylor eds., 1975) (describing the social scientists’ efforts as having “no unity of scope or method of comprehension, not even of language”).

⁴⁰ See Joel P. Trachtman, *Constitutional Economics of the WTO*, in RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

⁴¹ See Ernst B. Haas, *The Study of Regional Integration: Reflections on the Joys and Anguish of Pretheorizing*, 24 INT’L ORG. 607 (1970) [hereinafter Haas, *Joys and Anguish*], and Ernst B. Haas, *Turbulent Fields and the Theory of Regional Integration*, 30 INT’L ORG. 173 (1976) [hereinafter Haas, *Turbulent Fields*], for a representative sample of Haas’s use of functionalist and neo-functionalist principles.

⁴² See, e.g., Haas, *Turbulent Fields*, *supra* note 41, at 173 (“Theories of regional integration are becoming obsolescent because three core assumptions on which these theories have been based are becoming less and less relevant to the behavior patterns actually displayed by governments active in regional organizations.”); Mark F. Imber, *Re-Reading Mitrany: A Pragmatic Assessment of Sovereignty*, 10 REV. INT’L STUD. 103, 105 (1984) (“Functionalism does not satisfy Rapoport’s most exacting requirement that a theory . . . is a collection of derived theorems *tested in the process of predicting events from observed conditions.*”) (emphasis added).

⁴³ See, e.g., Imber, *supra* note 42, at 107 (“In these circumstances, Mitrany’s argument appeals to cost-benefit comparison.”).

⁴⁴ See David Mitrany, *The Functional Approach to World Organization*, 24 INT’L AFF. 350, 356 (1948) (“[T]he functional approach emphasizes the common index of need. There are many such needs which cut across national boundaries, and an effective beginning could be made by providing joint government for them.”).

to the establishment of rules or institutions, in order to predict the circumstances under which particular rules or institutions might arise.⁴⁵

Functionalism can be rehabilitated and operationalized by redefining its roots in the new institutional economics, which includes constitutional economics. By showing the logic of integration, and of disintegration, in terms of the analytical techniques of the new institutional economics, including transaction costs economizing, game theory, and other social scientific techniques, it is possible to explain why we would observe integration, stasis, or disintegration under specific circumstances. The basic methodology bringing these techniques together is comparative institutional cost-benefit analysis.⁴⁶ The first step will necessarily be a ground-up analysis of specific cooperation problems. Second, we must evaluate alternative institutional solutions to each of these cooperation problems. Third, we must evaluate the possibility of horizontal overlaps and institutional synergies that make it useful to establish institutions that are linked with one another or that perform multiple functions. This, in short, is the appropriate methodology of functionalism.

Mitrany's model began with national preferences: the need to cooperate with other states in order to achieve those preferences efficiently. This approach is consistent with a social scientific approach.⁴⁷

Mitrany's second step was to posit that international organizations would be formed in response to these needs.⁴⁸ This second step skipped over the possibility of the establishment of international law without a specific organization.⁴⁹ We might say that such establishment of international law relies on the default international legal system as its "organization."⁵⁰

Third, Mitrany posited that once an international organization is established, bureaucratic imperatives would result in an expanded set of powers for the international organization.⁵¹ This third step seems least plausible,

⁴⁵ See Imber, *supra* note 42, at 108 ("The second stage of Mitrany's argument is to establish *specific conditions* in which appropriate international organizations may be founded.") (emphasis added).

⁴⁶ See *id.* at 107 ("In these circumstances, Mitrany's argument appeals to cost-benefit comparison.").

⁴⁷ See *id.* at 105 ("[D]omestic governments recognize that the specific responsibilities that they currently discharge or may in future be called upon to meet will be more effectively performed through international co-operation.").

⁴⁸ See *id.* ("[A]n international organization relevant to [a responsibility the domestic government cannot effectively perform] must be established, and a grant of powers and resources made to it.").

⁴⁹ See *id.* at 108.

⁵⁰ The lack of "prior commitment to co-operation in other fields" implies a reliance on the default system and provisions of international law. *Id.*

⁵¹ Imber, *supra* note 42, at 109 ("Some authors have characterized this dynamic element in the development of the international organization's responsibilities as 'task-expansion.' This

as it assumes a kind of error, or failure to anticipate, on the part of the constitutive states. An alternative explanation involves a revelatory role for international organizations, discovering further opportunities for beneficial cooperation that would not be discovered otherwise. Furthermore, it is possible that established international legal rules or organizations would have excess capacity, and so economies of scale or scope might induce the allocation of additional responsibility to these rules or organizations.⁵² Finally, the growth of international legal rules makes it easier to enforce other international legal rules, so a kind of network externality might also allow expansion in one area to induce expansion in other areas. Mitrany also thought in terms of a single “seat of authority,” with transfer of authority over time after national sovereignty died a death of a thousand cuts.⁵³ Mitrany put it as follows:

By entrusting an authority with a certain task, carrying with it command over requisite powers and means, a slice of sovereignty is transferred from the old authority to the new, and the accumulation of such partial transfers in time brings about a translation of the seat of authority.⁵⁴

This approach seems historically incorrect and inconsistent with a federalist approach that would accept multiple loci of authority, or constitutional pluralism.⁵⁵ It also seems inconsistent with a social scientific or subsidiarity-based approach, which would accept that different types of problems are best addressed at varying levels of authority. Finally, it seems to assume that delegations of authority to international organizations would be systematically overbroad.⁵⁶

Most speculatively, and idealistically, “Mitrany argued that the successful growth of functional international organizations, fulfilling many of the welfare responsibilities previously reserved to the state, would create

refers to the identification of a trend towards the transfer of increasingly significant powers to the international organization concerned *vis-à-vis* the residual rights of the member states.”) (citation omitted).

⁵² See, e.g., Jeppe Tranholm-Mikkelsen, *Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC*, 20 MILLENNIUM: J. INT’L STUD. 1, 4 (1991) (“The establishment of supranational institutions designed to deal with functionally specific tasks will set in motion economic, social and political processes *which generate pressures towards further integration*.”) (emphasis added).

⁵³ DAVID MITRANY, *THE FUNCTIONAL THEORY OF POLITICS* 128 (1975).

⁵⁴ *Id.*

⁵⁵ See Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 317 (2002) (“Constitutional pluralism recognizes that in the post-Westphalian world there exists a range of different constitutional sites and processes . . .”).

⁵⁶ See MITRANY, *supra* note 53, at 128 (“To such willing transfers of sovereignty—or abridgement of national sovereignty—*there is no limit* except that set by our political maturity.”) (emphasis added).

positive incentives for states to maintain the peace.”⁵⁷ What is the mechanism by which functionalism causes peace?

Mitrany's argument that the successful functional organization of services will reduce the use of force between participants is based upon an appreciation of enlightened self-interest.⁵⁸ If state authorities increasingly rely on the technical and welfare services of international functional organizations in order to satisfy the aspirations of their citizens, then each government will become vulnerable to the dislocation of those services, insofar as it wishes to fulfill domestic political objectives.⁵⁹ So Mitrany's argument regarding peace is also based on a social scientific, cost-benefit analysis perspective: functional integration increases the costs of war in terms of lost opportunities for cooperation.⁶⁰

Is this argument borne out empirically? In the evolution of ever-broader social units, we see examples of a seeming decline of armed conflict between internal constituent units. If we observe the growth of the U.S., or of the E.U., we might see in their suppression of internal warfare evidence for Mitrany's proposition. Yet there are possible counterexamples in the violent break-up of federal states such as Yugoslavia, and in the domestic ethnic violence of Rwanda, the Congo, or Somalia. On the other hand, a refined study might show how these examples fit into a broader, more nuanced model. But that refined study is not available yet.

Friedmann observed in 1964 that “[t]he economic senselessness of major wars, now demonstrated beyond doubt, has, however, been joined by the increasing realisation of the physical futility of war as a means of attaining national objectives altogether.”⁶¹ While war has by no means been eliminated, international society has passed beyond a Hobbesian world of unconstrained coercion and theft. States may no longer increase their territory by conquest. It is broadly understood to be not only illegal, but also illegitimate, to engage in war to transfer wealth.⁶² No society has yet eliminated violence, and it is too idealistic to imagine that international society will do so. The important question is the incentives, and disincentives (including

⁵⁷ Imber, *supra* note 42, at 106.

⁵⁸ *Id.* (“Mitrany believed that the provision of improved welfare and economic opportunities through international co-operation would create strong ties between states, based on enlightened self-interest.”).

⁵⁹ *Id.* at 111.

⁶⁰ *Id.* at 107 (“[I]f equal or greater benefits may be obtained without use of force it is preferable to co-operate than to confront, and so avoid an unnecessary expenditure of resources.”).

⁶¹ FRIEDMANN, *supra* note 12, at 13.

⁶² Joseph C. Sweeney, *The Just War Ethic in International Law*, 27 *FORDHAM INT'L L.J.* 1865, 1867–68 (2003) (discussing the situations under the U.N. Charter where nations are justified in utilizing military force).

legal disincentives), for violence. It is possible that as a result of other developments, states will determine to establish more compelling systems of multilateral response to aggression.

Mitrany explained that the function would determine its appropriate organs.⁶³ The recognition that different functions require different organizational responses indicates that no one type of international organization would be appropriate in response to multiple cooperation problems.

Mitrany's functionalism is based on the idea that "activities would be selected specifically and organized separately—each according to its nature"⁶⁴ Thus, Mitrany's approach envisioned and validated what we call today "fragmentation."⁶⁵ While this approach did not fully evaluate the possibility of functional overlaps—overlaps between different activities—and economies of scope that might arise from combining functions within a single institution, Mitrany anticipated that some functions would intersect.⁶⁶ Coordination among functions would, according to Mitrany, come about functionally.⁶⁷

Mitrany, Haas, and other functionalists may have been ahead of their time, or may have relied too heavily on underspecified causal mechanisms, or both. Social science functionalism is based on welfarism; assuming that citizens, generally operating through states or perhaps regional organizations, would determine to utilize international legal cooperation in order to improve their welfare. There are, of course, other mechanisms. A public choice theorist would focus on political welfare instead of actual welfare.⁶⁸ A constructivist would examine the ways in which individuals, as citizens or as government officials, establish their beliefs and identities.⁶⁹ A behavioralist would similarly examine how individuals might develop loyalties separately from their welfare interests. I have no reason to exclude these mechanisms, and I have not performed the empirical research that would be necessary to show that the welfarist mechanism has greater explanatory power than these other mechanisms. But in many other circumstances, welfare has great explanatory power, and so it presents a useful theory, from

⁶³ DAVID MITRANY, *A WORK PEACE SYSTEM* 72 (1966).

⁶⁴ *See id.* at 70.

⁶⁵ *Id.* at 72.

⁶⁶ MITRANY, *supra* note 53, at 74.

⁶⁷ *Id.* at 74–75 ("The co-ordination of such working functional agencies with an *international planning* agencies would . . . bring[] out some interesting possibilities, should the ideas . . . come to fruition.").

⁶⁸ *See* William F. Shughart II, *Public Choice*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* 2008, available at <http://www.econlib.org/library/Enc/PublicChoice.html> (last visited Oct. 3 2011) (describing public choice theory).

⁶⁹ *See* Stephen M. Walt, *International Relations: One World, Many Theories*, *FOREIGN POLICY*, Spring 1998, at 29, 40–41 (discussing constructivist theory).

which testable hypotheses might be derived, and, more speculatively, from which policy may be made under uncertainty.

IV. CONCLUSION: WORLDVIEW IMPLICATIONS OF SOCIAL SCIENCE FUNCTIONALISM

Observers of international law have criticized the Westphalian paradigm for nearly a century. Over the long sweep of history, these criticisms have become more forceful. The Westphalian paradigm has become less useful, both as a general way to order the world, and as a general way to understand the world. Functional adaptation has already begun to reorder the world differently from the Westphalian paradigm. The E.U. is only the most obvious example. But this reordering has been impeded by the continued use of the Westphalian paradigm to understand the world. One of the goals of this book is to suggest a functionalist paradigm that understands the sovereignty of states in utilitarian, and contingent, terms.

Indeed, the exceptions to the Westphalian paradigm have been multiplying for the past one hundred years, and the movement toward an international law of cooperation that Friedmann documented in 1964 has accelerated and intensified the exceptions to the Westphalian paradigm so much that the need for a new paradigm is apparent.⁷⁰ This is the central crisis in international law. A simpler paradigm—one admitting far fewer exceptions—is the functionalist paradigm. This paradigm accepts that the state is contingent, and that international law tends to constrain, indeed, to mold, the state based on functional efficiency.

The state's continuing importance is validated by three forces: (1) its continuing ability to respond to many cooperation problems, (2) path dependence, which makes it difficult to move to other systems for ordering given the existing Westphalian paradigm, and (3) network externalities, which similarly support isomorphism among states. Of course, the first is the most powerful force, but it has been growing weaker. Path dependence and network externalities are subsidiary forces. The slow erosion in the utility of the state to respond to certain types of cooperation problems can be expected to reach a point where it entirely demeans the force of path dependence and network externalities. This point will be something like a "tipping point," where the availability of multiple institutional structures will deprive path dependence and network externalities of most of their power. At that tipping point, the Westphalian paradigm will cease to have significant power and will be replaced by the functionalist paradigm.

The worldview implications of a paradigm shift are important. Under social science functionalism, we would accept that international law is

⁷⁰ See generally FRIEDMANN, *supra* note 12, ch. 6 (addressing the changing structure of international law).

important in order to address pressing international problems characterized by externalities or global public goods. We would accept that the scope of international law will be determined by what is necessary to address these problems, that it may be great, and that its scope is not limited by sovereignty. We would understand that international law may have varying levels of power—that power is a design feature that depends on the particular cooperation problem being addressed. Under some circumstances—of high asset specificity—in order to be effective international law will require great power. These circumstances may include topics like global warming, monetary policy, or the use of force. Before we develop effective law against use of force, greater integration may reduce incentives and capability to use force. This was the original functionalist idea of the 1952 European Coal and Steel Community, and of the subsequent European Economic Community.